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BINA PURI PROPERTIES SDN BHD v. OLIVER GOH THIAM SIE

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
AMELATI PARNELL JC
[CIVIL APPEAL NO: BKI-12A-4-9-2021]
28 APRIL 2022

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Abstract – *The sale and purchase agreement in this case was a special social-legislation contract governed by the Sabah Statutes with every intention to protect the interests of the purchasers from huge developer companies. The financier's deed of assignment, which was derived from the SPA, could not override the terms of a master agreement and statutory contract by adding on more onerous terms onto it. The purchaser of the property had the locus standi to institute the action against the housing developer for its failure to deliver vacant possession by the due date; the Sessions Courts did not commit any error of law or fact in finding that this was a plain and obvious case for summary judgment.*

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CIVIL PROCEDURE: *Summary judgment – Application for – Whether plain and obvious case for summary judgment – Rules of Court 2012, O. 14*

CONTRACT: *Agreement – Sale and purchase agreement ('SPA') – Breach – Failure to deliver vacant possession by due date – Claim for liquidated damages – Whether contract statutory in nature – Whether strict adherence necessary – Whether deed of assignment ('DOA') provide precondition in sale and purchase agreement which must be complied with – Whether clauses in DOA incompatible and directly opposed to SPAs – Whether DOA could override terms of master agreement – Whether plaintiff had locus standi to carry out action*

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LAND LAW: *Vacant possession – Failure to deliver by due date – Claim for liquidated damages – Breach of sale and purchase agreement – Whether contract statutory in nature – Whether strict adherence necessary – Whether deed of assignment ('DOA') provide precondition in sale and purchase agreement which must be complied with – Whether clauses in DOA incompatible and directly opposed to SPAs – Whether DOA could override terms of master agreement – Whether plaintiff had locus standi to carry out action*

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The plaintiff entered into a sale and purchase agreement ('SPA') with the defendant, a licensed housing developer to purchase a residential condominium ('said property'). The purchase price for the said property was fully and duly paid to the defendant. The plaintiff's cause of action against the defendant was premised on the defendant's breaches of the SPA *ie*, delay in the delivery of vacant possession with occupation certificate of the said

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property ('VP delivery'). Pursuant to the SPA, the plaintiff claimed for liquidated damages for the delay in the VP delivery ('said claim'). In this proceeding, the plaintiff applied for summary judgment under O. 14 of the Rules of Court 2012. The Sessions Court had excluded the period from 18 March 2020 to 27 November 2020 from the said claim as provided under s. 11 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Enactment 2020. Pursuant to that, the sum of RM169,749.51 was adjudged to be paid by the defendant to the plaintiff. The grounds of objections by the defendant before the Sessions Court were, *inter alia* (i) the plaintiff had failed to establish a *prima facie* case; and (ii) the said property had been absolutely assigned to Public Bank Berhad ('the financier'). The defendant's grounds for this appeal were (i) the plaintiff's claim was premature as cls. 3 and 16.2 of the deed of assignment ('DOA') provide a precondition in the sale and purchase agreement, which was to obtain the consent of the financier before commencement of a lawsuit, that ought to be complied with; (ii) the issue of *locus standi* need not be pleaded in the statement of defence; and (iii) retrospective consent shall not be considered as the plaintiff had initiated the suit prior to obtaining the financier's consent.

Held (dismissing appeal; upholding decision of Sessions Court):

(1) The DOA between the plaintiff and the financier was a mere instrument to secure the repayments of the loan by the plaintiff pending the issuance of a strata title and registration of the financier's charge onto the strata title. The loan documents clearly stated the rights and interests to the said property were not irreversibly assigned absolutely to the financier. Further, clauses in the DOA which stipulated consent of the financier was first required before any commencement of lawsuit pursuant to the Housing Development (Control and Licensing) Act 1966 ('HDA 1966') was legally unsustainable as the clauses were incompatible and directly opposed to the SPA's s. 3. The financier's DOA, which was derived from the SPA, could not override the terms of a master agreement and statutory contract by adding on more onerous terms onto it. Further, there was no issue of retrospective consent. The financier's letter of consent itself was proof that prior communications had been conducted between the plaintiff and his financier on the plaintiff's intention on this lawsuit. (paras 25, 28, 29 & 31)

(2) In this action, the applicable laws on the SPA and the said property were the Sabah Statutes. In comparison of HDA 1966 and the Sabah Statutes, the Sabah Statues do not require consent from the financier for the commencement of a legal action against the developer. Therefore, the DOA prepared by the financier was lackadaisically drafted with no due considerations made to the unique legal landscape of Sabah's applicable laws. With these extraneous requirements of consent in its DOA terms,

A the DOA had in effect wrongfully added more onus and burden to the plaintiff, impairing the plaintiff's enshrined SPA's statutory right and had departed from the intentions of the Sabah Statutes. Any of the terms of the DOA which run counter, incompatible to the Sabah Statutes, ought to be wholly disregarded by this court. The financier could not B modify the statutory SPA rights by adding in a more burdensome duty to get the consent to sue. (paras 34-36)

(3) The plaintiff was relying in particular on cls. 1(o) and 1(r) of the First Schedule to the SPA. As provided in cl. 1(o) of the SPA, the due date for the VP delivery was 36 months from the date of the signing of the C SPA. The date of the SPA was on 8 September 2014. Pursuant to the cl. 1(o), 36 months after the date of the SPA fell on 7 September 2017. The defendant had failed to comply with the mandatory statutory provision of the SPA. It was well documented that the defendant had failed to deliver the VP delivery by the said due date. The contract in D question was statutory in nature, and as such, strict adherence was necessary. (paras 37-42)

(4) The Sessions Court was not wrong in referring to the principle enunciated in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* that the E interests of the purchasers shall be the paramount consideration against the developer as in this case which prescribed and regulated by the Housing Development (Control and Licensing) Enactment 1978 and the Housing Development (Control and Licensing) Rules 2008. The SPA was a social legislation contract where the legislation's primary purpose F was to protect the purchaser from the developer who had the stronger bargaining power. (para 45)

(5) The plaintiff had the *locus standi* to carry out this action. There was clear unequivocal language of the SPA where the plaintiff could institute an action in his own name despite assignment to the financier. Thus, it is G trite law that all claims and defences are to be defined within the walls of pleadings. The Sessions Court Judge did not commit any error of law or fact in finding that the present case was a plain and obvious case for summary judgment. (paras 47, 49 & 53)

Case(s) referred to:

H *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC* ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Brisdale Resources Sdn Bhd v. Law Kim [2004] 6 MLJ 76 ***(refd)***

Chua Chong Poh & Ors v. Kingsley Hills Sdn Bhd & Anor [2020] 1 LNS 1110 HC ***(refd)***

I *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor And Another Appeal [2008] 6 CLJ 334 CA* ***(refd)***

Encony Development Sdn Bhd v. Robert Geoffrey Gooch & Anor [2016] 1 CLJ 893 CA ***(refd)***
Episo Enterprise Sdn Bhd v. Wong Gin Gin [2021] 1 LNS 861 HC ***(refd)***
M/s Laksamana Realty Sdn Bhd v. Goh Eng Hwa [2004] 1 CLJ 274 CA ***(dist)***
Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors [2018] 1 LNS 62 CA ***(refd)***
Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(refd)***
Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corporation Sdn Bhd & Ors [2017] 9 CLJ 45 CA ***(refd)***
Taufiq Thiagi Abdullah v. Ong Lian Chiang & Ors [2020] 1 LNS 2105 HC ***(dist)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***
Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 6 CLJ 232 FC ***(foll)***

Legislation referred to:
Rules of Court 2012, O. 14 rr. 1, 2
Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Enactment 2020, s. 11

For the appellant/defendant - Chin Kok Seun; M/s LV Partners
For the respondent/plaintiff - Andrew Chang Vun Kee; M/s Wong & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Amelati Parnell JC:

Introduction

[1] At the Sessions Court, summary judgment was entered against the appellant on the 3 September 2021. Notice of appeal dated 17 September 2021 was then filed.

[2] The following pleadings were filed by the parties in the Sessions Court:

(i) amended writ of summons and statement of claim (encl. 10);

(ii) memorandum of appearance (encl. 6); and

(iii) amended statement of defence (encl. 13).

[3] The cause papers in relation to the summary judgment application are as follows:

(i) notice of application dated 24 June 2021 (encl. 20);

(ii) affidavit in support affirmed by Oliver Goh Thiam Sie affirmed on 23 June 2021 ("AIS") (encl. 21);

(iii) affidavit in opposition affirmed by Chan Jiunn Liang on 9 July 2021 ("AIO") (encl. 22);

A (iv) affidavit in reply affirmed by Oliver Goh Thiam Sie on 21 July 2021 ("AIR") (encl. 24).

[4] For clarity, parties will be referred to as they were in the Sessions Court.

B **Background Of The Plaintiff's Claim**

[5] The plaintiff had entered into a sale and purchase agreement dated 8 September 2014 (hereinafter referred to the SPA) with the defendant, a licensed housing developer to purchase a residential condominium known as Lot W-8-2, Level 8, Jesselton View, Hilltop Kota Kinabalu, Sabah,
C Malaysia (hereinafter referred to as "the said property").

[6] The purchase price for the said property was fully and duly paid up to the defendant.

[7] The plaintiff's cause of action against the defendant is premised on the
D defendant's breaches of the SPA *ie*, delay in the delivery of vacant possession with occupation certificate of the said property (hereinafter be referred as "the VP delivery").

[8] Pursuant to the SPA, the plaintiff claims for liquidated damages for the delay in the VP delivery (hereinafter referred to as "the said claim").

E **[9]** In this proceeding, the plaintiff applies for summary judgment of this matter, under O. 14 r. 1 of Rules of Court 2012. Upon reading the submissions and hearing the parties, the Sessions Court had excluded the period from 18 March 2020 to 27 November 2020 from the said claim as provided under s. 11 of Temporary Measures for Reducing the Impact of
F Coronavirus Disease 2019 (Covid-19) Enactment 2020 (hereinafter referred to as "the Covid Act"). Pursuant to that, the sum of RM169,749.51 was adjudged to be paid by the appellant to the respondent.

Defendant's Contention

G **[10]** Grounds of objections by the defendant before the Sessions Court are as follows:

(i) the plaintiff has failed to establish a *prima facie* case;

(ii) the said property has been absolutely assigned to Public Bank Berhad;

H (iii) the Minister's decision for extension of time is crucial;

(iv) the calculation of the liquidated ascertained damages is wrong.

[11] Having perusal of the defendant's written submission in this appeal, it was submitted that the defendant's grounds for this appeal are as follows:

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(i) the respondent's claim is premature as cl. 3 and cl. 16.2 of the deed of assignment provide a precondition in the sale and purchase agreement which must be complied with.

(ii) the issue of *locus standi* need not to be pleaded in the statement of defence.

(iii) Retrospective consent shall not be considered as the respondent has initiated the suit prior obtaining the said consent.

Analysis And Findings

[12] To invoke appellate intervention, it is noteworthy that the case of *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; [2018] Supp MLJ 363 held that:

> It is well settled law that **an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision.** A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32; *Watt or Thomas v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309). (emphasis added)

[13] Order 14 r. 1 of the Rules of Court 2012 states as follows:

> Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff, on the ground that the defendant has not defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

[14] In *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14, it was held that:

> Under O. 14, when a fact is asserted by one party and denied by another, and **such denial is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents** or other statements by the same deponent or is inherently improbable in itself **the Judge has a duty to reject such assertion or denial, thereby rendering the Issue as not triable.** (emphasis added)

[15] For the purpose of this appeal, I am satisfied that the preliminary requirements have been complied with *ie*, (i) the statement of claim has been served on the defendant; (ii) the defendant (in the Sessions Court) have entered appearance; and (iii) the affidavit in support of the application has complied with the requirements of r. 2 of O. 14 of the ROC 2012.

[16] The burden then shifts to the defendant herein to satisfy the court why judgment should not be given *ie*, the defendant must be able to show by affidavit that a triable issue has been raised.

[17] The issues raised by the defendant in this appeal are interrelated namely purported defence of pre-condition to sue (*locus standi*), deed of assignment ("DOA") and Housing Development (Control and Licensing) Act 1966.

[18] It was submitted that the said property is assigned to the financier, *ie*, Public Bank Berhad and the plaintiff knew about the pre-condition stated in cl. 3 of the First Schedule of the SPA. However, the plaintiff only elects to notify the financier on 16 July 2021 after filing this suit on 24 February 2021 which is five months after the filing of the suit. The pre-condition of the SPA and DOA has not been fulfilled.

[19] The defendant submits that the wordings of cl. 3 of the SPA and the wordings in the DOA are clear. The word "shall" in cl. 3 of the First Schedule of the SPA and cl. 4.3 of the DOA provide a mandatory condition towards the plaintiff for the purpose of initiating an action against the defendant. (see: *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor And Another Appeal* [2008] 6 CLJ 334; [2009] 1 MLJ 625).

[20] It was further submitted that the financier's consent should not be retrospective. The plaintiff cannot initiate any action while the plaintiff does not have *locus standi* to initiate the action at that time. This is held in the Court of Appeal case of *Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corporation Sdn Bhd & Ors* [2017] 9 CLJ 45; [2017] 6 MLJ 116 as follows:

> When the writ and the statement of claim was filed on 23 February 2011 in Suit 207, there was no sanction obtained by the first respondent. Sanction was only obtained on 3 June 2015, post filing of the writ and statement of claim. In view of the fact that the sanction was only obtained after the suit had been filed, the first respondent had no capacity to institute Suit 207. The sanction obtained after the filing of Suit 207 could not be made retrospective (see paras 27, 34 & 48).

[21] Hence, the defendant contends that the non-compliance of cl. 3 of the First Schedule of the SPA and cl. 4.3 of the DOA will render the claim unsustainable (see: *Chua Chong Poh & Ors v. Kingsley Hills Sdn Bhd & Anor* [2020] 1 LNS 1110; [2020] MLJU 1452).

[22] The SPA herein is prescribed and regulated by the Housing Development (Control and Licensing) Enactment 1978 and the Housing Development (Control and Licensing) Rules 2008. From the outset, s. 3 of the SPA expressly provides that:

> **The Purchaser shall be entitled on his own volition and name to institute and maintain any action in relation to any matters arising for this Agreement** and against any person before any court, tribunal or body. **If this Agreement is assigned to a Financier then the Purchaser shall forthwith notify the Financier.** (emphasis added)

[23] It was submitted by the plaintiff that in the natural reading of s. 3 of the SPA, the plaintiff is fully entitled to carry out this action in his own name despite having assigned the SPA to Public Bank Berhad (Co. No 6463-H) a licensed banking institution (hereinafter referred to as the financier) as security for his housing loan. The plaintiff submits that the financier is notified of this action.

[24] The plaintiff rejects the defendant's claim that the plaintiff had only elected to notify the financier on 16 July 2021. It was submitted that the document referenced in the financier's letter of consent *ie*, "authorisation letter to the bank dated 16 July 2021" merely refers to the letter of indemnity cum undertaking (prepared by the financier in their standard template) which the financier required the plaintiff to sign before the issuance of the said letter of consent. The plaintiff reiterates that he had duly notified the financier on his action well before 16 July 2021.

[25] I am of the views that there is no issue of retrospective consent. The financier's letter of consent itself is proof that prior communications had been conducted between the plaintiff and his financier on the plaintiff's intention on this lawsuit. The letter states:

> Premised to the above, the bank has no objection **to your intended legal proceedings** to claim Late Ascertained Damages (LAD) against the Developer for late delivery of vacant possession. (emphasis added)
>
> (See pp. 146-147 of encl. 2 of the financier's letter).

[26] The defendant further contends that the assignment to Public Bank Berhad is an absolute legal assignment due to the following reasons:

(i) It is clear that the debt is still existing and the assignment has been assigned to the financier due to the existence of the DOA.

(ii) All of the plaintiff's rights including right to lease and proceeds of sale have been surrendered to Public Bank Berhad pursuant to cls. 3, 3.3, 4.3, 15, 17, 18, 24, 25 and 55 in the DOA.

[27] It was submitted that the above clauses in the DOA proved that the plaintiff has assigned all of their rights to Public Bank Berhad. Moreover, the financier holds an absolute assignment is consistent with the use of the word of "assigns absolutely" used from time to time in the DOA.

[28] Having considered the submission of both the defendant and the plaintiff herein, I am with the plaintiff that the deed of assignment between the plaintiff and the financier is a mere instrument to secure the repayments of the loan by the plaintiff pending the issuance of a strata title and registration of the financier's charge onto the strata title. The conditions of the security for the loan are stated as follows:

> (d) a registered closed all monies 1st party charge is to be created over the subject property upon issuance of individual/strata title
>
> 70(b) the Assignment shall be revoked by the execution and registration thereof by the Assignor of a charge under the appropriate Land Legislations affecting the said Property (which shall be in the form and manner satisfactory to the Bank) over the said Property in favour of the Bank.

[29] The above provisions in the loan documents are clear to state the rights and interests to the said property are not irreversibly assigned absolutely to the financier.

[30] In *Brisdale Resources Sdn Bhd v. Law Kim* [2004] 6 MLJ 76, the High Court held that:

> *Even though the plaintiff did sign the deed of assignment, his capacity to institute this action was not prejudiced because the assignment by the plaintiff to the bank was merely an assignment by way of charge and not an absolute assignment.* There were covenants by the bank as assignor to reassign the said apartment back to the plaintiff in the event individual documents of title are issued, and if the loans are still then subsisting, to create registerable legal charges over the properties so secured. And if individual documents of title were not issued when the loans are repaid the assignors would reassign back the rights and interest in the sale and purchase agreements to the plaintiff. (emphasis added)

[31] Further, clauses in the DOA which stipulate consent of the financier is first required before any commencement of lawsuit pursuant to Housing Development (Control and Licensing) Act 1966 (hereinafter referred to as "HDA 1966"), is legally unsustainable as the clauses are incompatible and directly opposed to the SPA's s. 3. The financier's DOA, which is derived from the SPA, cannot override the terms of a master agreement and statutory contract by adding on more onerous terms onto it.

[32] This is clear stated in *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232 at p. 236, the Federal Court said:

> [3] Now, cl. 23 is part of a statute based contract. In this country, the relationship between a house-buyer and a licensed developer is governed by the Housing Developers legislation. Its object is to protect house-buyers against developers. A developer must execute the agreement set out in the schedule to the relevant subsidiary legislation. He cannot add other clauses in it.

[33] Applying the law and principle of the Federal Court case to this action, the financier cannot add a more burdensome duty namely to get consent to sue with regard to a right to sue which is enshrined in the statutory SPA.

[34] As pointed out by the plaintiff, the financier's DOA had made many references, in particular cl. 16 therein, to the HDA 1966 which only applies to Peninsular Malaysia and has no jurisdiction in this matter. In this action, the applicable laws on the SPA and the said property are the Sabah Statutes. In comparison of HDA 1966 and the Sabah Statutes, the Sabah Statutes do not require consent from the financier for the commencement of a legal action against the developer.

[35] Therefore it can be established that the DOA prepared by the financier is lackadaisically drafted with no due considerations made to the unique legal landscape of Sabah's applicable laws. With these extraneous requirements of consent in its DOA terms, the DOA had in effect wrongfully added more onus and burden to the respondent, impairing the respondent's enshrined SPA's statutory right and had departed from the intentions of the Sabah Statutes.

[36] As enunciated by the standing decision of the Federal Court in *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* (*supra*), any of the terms of the DOA which run counter, incompatible to the Sabah Statutes be wholly disregarded by this court. The financier cannot modify the statutory SPA rights by adding in a more burdensome duty to get the consent to sue.

[37] In the present case, the plaintiff is relying in particular on cls. 1(o) and 1(r) of the First Schedule to the said SPA. In Schedule H of the SPA, the terms contained therein are *inter alia* as follows:

> Clause 1 (o) – The date of the delivery of vacant possession of the Parcel to the Purchaser together with the Occupation Certificate for the Parcel shall not be later than thirty-six (36) months after the date of the signing of this Agreement
>
> Clause 1 (r) – The Developer shall indemnify the Purchaser for any delay in the delivery of vacant possession of the Parcel. The amount of indemnity shall be calculated from day to day at the rate of eight per centum (8%) per annum of the purchase price commencing immediately after the date of the delivery of Occupation Certificate ought to have been procured as specified in this Agreement up to the date such delivery is made
>
> Clause 4 – Time shall be the essence of the contract in relation to all provisions in this Agreement.

[38] As provided in cl. 1(o) of the SPA, the due date for the VP delivery is 36 months from the date of the signing of the SPA. The date of the SPA is on 8 September 2014. Pursuant to the cl. 1(o), 36 months after the date of the SPA falls on 7 September 2017.

[39] There is no dispute that the defendant had failed to comply with the mandatory statutory provision of the SPA. It is well documented that the defendant had failed to deliver the VP delivery by the said due date.

[40] As prescribed in cl. 1(r) of the SPA, failure by the defendant to deliver VP delivery by the said due date shall render the defendant be liable to indemnify the plaintiff for late delivery interests. The calculation of the late delivery interests pursuant to cl. 1(r) of the SPA was laid out in encls. 10 and 21, and is now reproduced as follows:

Purchase Price	**RM840,900.00**
Date of The Agreement	8th Sept 2014
Date Occupation Certificate Ought to Be Obtained	7th Sept 2017
Date Occupation Certificate Was Granted	27th Nov 2020
Number of Days Delayed (Calculated From 7th Sept 2017 To 27th Nov 2020)	1,177 Days
Daily Interest (As Per Clause 1 (r))	RM840,900.00 x 8% per annum/365 Days = RM184.31 per day
Accrued Late Delivery Interests	1,177 days x RM184.31 = RM216,929.16

[41] The SPA herein is prescribed and regulated by the Housing Development (Control and Licensing) Enactment 1978 and the Housing Development (Control and Licensing) Rules 2008.

[42] The contract in question was statutory in nature, and as such, strict adherence was necessary. This principle was expounded by the Court of Appeal in *Encony Development Sdn Bhd v. Robert Geoffrey Gooch & Anor* [2016] 1 CLJ 893, where it was stated:

> The SPA between the respondents and the appellant, who is a housing developer, is governed by a statutory form of contract as prescribed in **sch. H of the Housing Development (Control and Licensing) Regulations 1989 [PU(A) 58/1989] ('the regulations').** As such, the

provisions in the **SPA are not merely contractual, but are in effect statutory provisions,** as they are actually provisions of **sch. H of the Regulations, which have been imposed by law upon the parties.**

(emphasis added)

[43] The SPA is a social legislation contract where the legislation's primary purpose is to protect the purchaser from the developer who has the stronger bargaining power. This, as submitted by the plaintiff is clearly established in the following cases:

(i) In *Brisdale Resources Sdn Bhd v. Law Kim* [2004] 6 MLJ 76, the court held that "the intention of the statutory contract is to protect purchasers such as the plaintiff from the defendant who has more bargaining power and who unilaterally takes advantage of interpreting the plaintiff's conduct as a waiver and who could refuse to pay compensation even though in breach of the agreement".

(ii) In *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618 CA para. [8], Gopal Sri Ram JCA dealt with the same statutory provision and spoke of the inviolable position of the SPA in the following terms: "… The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed."

(iii) See also *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* (*supra*).

(iv) In *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281 the Federal Court held that the Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer. Parliament has entrusted the Minister to safeguard the interests of the purchasers and the Minister has prescribed the terms and conditions of the contract of sale as per Schedule H.

[44] The recent judgment decided by His Lordship Christopher Chin Soo Yin JC in *Episo Enterprise Sdn Bhd v. Wong Gin Gin* [2021] 1 LNS 861; [2021] MLJU 984 who held at para. [45] that no separate interpretation is allowed for statutory form of sale and purchase agreement:

The S&P modelled strictly in accordance with Form H of the Regulations made the respective rights and obligations of the parties very clear and *no separate interpretation is possible. The Developer constructs and completes in the allowed period of time, based on approved plans and in exchange the purchaser pays the agreed price and in the prescribed manner and instalments.*

(emphasis added)

[45] Hence the Sessions Court is not wrong in referring to the principle enunciated in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* (*supra*) that the interests of the purchasers shall be the paramount consideration against the developer as in our case which is prescribed and regulated by the Housing Development (Control and Licensing) Enactment 1978 and the Housing Development (Control and Licensing) Rules 2008. The SPA is a social legislation contract where the legislation's primary purpose is to protect the purchaser from the developer who has the stronger bargaining power.

[46] The affidavit evidence shows that there is no dispute that the defendant had delayed in the VP delivery. The defendant had only informed on the VP delivery on 7 December 2020. The occupation certificate was only issued by the relevant authority Dewan Bandaraya Kota Kinabalu on 27 November 2020. The delay in VP delivery was grossly delayed for more than three years after the said due date (7 September 2017).

[47] In view of the above, it is my findings that the plaintiff has the *locus standi* to carry out this action. There is clear unequivocal language of the SPA where the plaintiff can institute an action in his own name despite assignment to the financier.

[48] Following from this, the case of *M/S Laksamana Realty Sdn Bhd v. Goh Eng Hwa* [2004] 1 CLJ 274; [2004] 3 MLJ 97 and *Taufiq Thiagi Abdullah v. Ong Lian Chiang & Ors* [2020] 1 LNS 2105; [2020] MLJU 2361 cited by the defendant are to be distinguished whereby issue of *locus standi* went to the jurisdiction of the trial court and hence the question of pleading does not arise.

[49] In the present case, it is the finding of this court that the plaintiff has the *locus standi* to carry out this action, thus it is trite law that all claims and defences are to be defined within the walls of pleadings.

[50] It is apparent that the defendant purported defence of "lack of *locus standi*" was never pleaded in the defendant's amended statement of defence. Therefore, the Sessions Court was correct when it rules that:

> As the claims and defences relied upon by the respective parties in the trial must be contained within the four walls of their respective pleadings the aforesaid defence should be disregarded.

[51] In *Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors* [2018] 1 LNS 62; [2018] 4 MLJ 209 where it was held that:

> If the respondents wanted to rely on the defence of reportage, they should have expressly pleaded that defence so that the appellant was not taken by surprise. By not pleading reportage, the respondents were precluded from relying on that defence or from proving reportage at trial.

[52] It is trite that the rules of pleadings must be fully and wholly observed by the parties and it is the sacrosanct duty of the court to ensure this is dutifully carried out and complied with to ensure justice is carried out and to prevent ambush and surprises to the litigants.

Conclusion

[53] Having considered all the pleadings and affidavit evidence adduced, this court of the view that the learned Sessions Court Judge did not commit any error of law or fact in finding that the present case is a plain and obvious case for summary judgment.

[54] The SPA is a special social-legislation contract governed by the Sabah Statutes with every intention to protect the interests of the purchasers from huge developer companies. The financier's DOA, which is derived from the SPA, cannot override the terms of a master agreement and statutory contract by adding on more onerous terms onto it.

[55] Therefore the decision of the learned Sessions Court Judge is hereby upheld. The appeal is dismissed with cost of RM5,000 subject to payment of allocator fee.